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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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JERRY W. AYERS,  
*Complainant,*

v.

NORTHERN MONROE PROT. FIRE TERR.,  
*Respondent.*

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Formal Complaint No.  
18-FC-65

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging the Northern Monroe Protective Fire Territory (“NMFT”) violated the Open Door Law<sup>1</sup> (“ODL”). The NMFT responded to the complaint through attorney Darla S. Brown. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 7, 2018.

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<sup>1</sup> Ind. Code §§ 5-14-1.5-1 to -8

## BACKGROUND

The Complainant, Jerry Ayers, alleges the Northern Monroe Fire Territory formed a Technical Review Committee (“Committee”) to review a proposed new fire station in Washington Township. The Committee met several times in the first quarter of 2018. The meetings were closed to the public and notice was not given. While some of the matters raised in his complaint are outside the scope of this office, Ayers feels the Committee meetings should be open. He also takes exception to a police officer’s presence at the NMFT’s public meetings and their public comment policies.

The new fire station is to be part of a build-operate-transfer agreement (“BOT”) sometimes referred to a public-private-partnership (“P3”). BOTs have a unique bidding process under Title 5 of the Indiana Code and is somewhat distinguishable from other build-design initiatives.

During the July 5, 2017 public meeting of the NMFT Executive Committee, the board appointed the Technical Review Committee when the project was first envisioned as a build-design project. As an aside, technical review committees are subject to the Open Door Law in the build-design context pursuant to Indiana Code section 5-30-4-4.

When it was transmuted to a BOT project, the NMFT was under the impression it no longer needed to have the Technical Review Committee meetings be public as there was no express analogue to Indiana Code section 5-30-4-4 under the BOT statute. *See* Ind. Code § 5-23-1 et. seq. The NMFT also leans upon the unique bidding process of the BOT statute to justify not having the meetings be open.

As for the other issues raised in the complaint, NMFT argues its actions regarding public comment forums and police presence are not violation of the Open Door Law.

## ANALYSIS

### 1. The Open Door Law (“ODL”)

It is the intent of the Open Door Law (“ODL”) that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed. *See* Ind. Code § 5-14-1.5-1. Accordingly, except as provided in section 6.1, the ODL requires all meetings of the governing bodies of public agencies to be open at all times to allow members of the public to observe and record the proceedings. *See* Ind. Code § 5-14-1.5-3(a).

The parties do not dispute that the Northern Monroe Fire Territory is a public agency for purposes of the ODL; and thus, subject to the law’s requirements. So, unless an exception applies, all meetings of the Executive Committee (its governing body) must be open at all times to allow members of the public to observe and record.

#### 1.1 Committees

Indiana Code section 5-14-1.5-2(b)(3) states that a governing body is “any committee appointed directly by the governing body or its presiding officer to which authority to take official action upon public business has been delegated.”

The question here is whether the Technical Review Committee was directly appointed by the Council or whether it

was simply a non-majority gathering to discuss details of the project.

The term “appointed directly” is not defined by the Open Door Law. Even so, Indiana Code section 5-14-1.5-1 requires a liberal reading of the ODL and a narrow construction of its exceptions. Appointed directly could be reasonably interpreted as “designated” or “assigned.” It appears from the meeting minutes of the July 2017 gathering, the Committee was indeed appointed directly by the NMFT Executive Board.

It matters not whether the members of the new committee are sitting members of other boards, fellow public employees or volunteer at-large members of the public; a new committee is formed whenever a governing body delegates official action to a committee, by whatever name designated.

If the Committee was formally created by some declaration or mandate from the Council, it would be a new governing body - a board within a board. If it was an organically formed ad hoc meeting of a volunteer non-majority gathering of Council members, it would not be a new governing body. But that does not appear to be the case in the current instance.

It also matters not whether another statute is silent as to committees create pursuant to its provisions. The presumption is that the Open Door Law applies to *any* governing body unless another statute expressly states that it does not.

Information provided to this Office suggests the Executive Committee had a designated Technical Review Committee to discuss details of the project when it was a design-build

project. The status of the Technical Review Committee does not change when the project was designated as BOT.

Membership on this committee was not fluid, nor did the subject matter change. It seems as if it was exclusively established to discuss details of the new fire station and the Executive Committee expressly ratified membership. It has the form and shape of a separate committee as contemplated by the Open Door Law. The technical committee derived its existence solely to take official action on public business directly from the Executive Committee with no intervening steps.

Therefore, the Technical Review Committee should have conducted its meetings openly. From the information provided, it does appear as if the NMFT relied in good faith upon the advice of counsel and consultants. However, the NMFT should be mindful going forward that any of its committees are subject to the Open Door Law and conduct meetings accordingly.

### **1.2 Police at Public Meetings and Public Comment**

Ayers also implies that police presence at meetings are a deterrent to public access and participation in the public comment forum of the meetings. This Office cannot agree. Police presence at meetings are a relatively common occurrence at any number of kinds of meetings and are not indicative of poor practice or governance.

As it pertains to public comment, the Open Door Law authorizes the public to “observe and record” meetings. Ind. Code § 5-14-1.5-3(a). Distinguishable from hearings, public comment at a regular meeting remains a privilege and not a right. The opportunity to speak at a meeting is not even

mentioned in the law, let alone guaranteed. That said, public participation is an encouraged practice, but with the caveat that parameters be placed upon the time and manner of comment to promote order and civility.

## **CONCLUSION**

Based upon the foregoing, it is the Opinion of the Public Access Counselor that the NMFT's Technical Review Committee meetings should have been open. NMFT has expressed a willingness to this Office to revise its practice. As for the issue of police presence and public comment guidelines, I take no exception with the NMFT's current practice.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

**Luke H. Britt**  
Public Access Counselor